

1930211 (Migration) [2023] AATA 1846 (11 May 2023)

ApplID: 1930211

DECISION RECORD

DIVISION: Migration & Refugee Division

REPRESENTATIVE: Ms Yi Zhang (MARN: 1463250)

CASE NUMBER: 1930211

MEMBER: Rachel Westaway

DATE: 11 May 2023

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 11 May 2023 at 3:22pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing partner relationship – misleading information – mutually exclusive relationship – Australian citizen child – relationship ceased – custody arrangements – request for Ministerial Intervention – decision under review affirmed

LEGISLATION

Child Support (Assessment) Act 1989
Family Law Act
Migration Act 1958, ss 48, 65
Migration Regulations 1994, r 1.15; Schedule 2, cl 801.221

CASES

He v MIBP [2017] FCAFC 206
Srour v MIMIA (2006) 155 FCR 441

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 8 October 2019 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 10 July 2015 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801. 221(2) because the delegate was not satisfied that the applicant was the spouse or de facto partner of the sponsor at the time of decision.
4. The applicant appeared before the Tribunal on 24 April 2023 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse or de facto partner of the sponsor.
8. **Background**
9. The applicant, [named], is a Chinese national who was born on [DOB] and is [age] years old.
10. The sponsor, [named], is an Australian citizen who was born on [DOB] and is [age] years old.
11. The applicant met the sponsor on [date] when he was in high school, where they began dating. The applicant and sponsor married [in] July 2015 and hosted a wedding banquet in [a town in] Victoria [later in] July 2015.
12. **The Department application**
13. The applicant lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on 10 July 2015 on the grounds of being in a partner relationship with an Australian citizen, the sponsor, who lodged a sponsorship in support of the application.
14. The applicant was granted the Subclass 820 visa on 21 October 2016. The applicant lodged their subclass 801 visa application on 21 September 2017.
15. The following documents were provided in support of the visa application:

- Form 888 statutory declaration by [Friend A] dated 13 September 2017
- Form 888 statutory declaration by [Friend B] dated 15 September 2017
- Statutory Declaration by the sponsor dated 13 September 2017
- Residential Tenancy Agreement in joint names for property at [Address 1] dated 16 September 2015
- Photographs of presents from the applicant to the sponsor
- Document listing distribution of housework
- Evidence of the applicant listing the sponsor as his beneficiary for his superannuation
- [Bank 1] Loan Facility Details to [Business 1] dated 1 March 2015
- Company Statement of [Business 1] in joint names issued 26 July 2017
- Joint [Bank 2] Account Statement as at 8 September 2017 and 7 June 2018, and 20 January 2019
- Contract of Sale for vehicle in the name of [Business 1] dated 21 January 2017
- [Named] Gas account in joint names for [Address 2] property from 2015 to 2017
- [Named] Water account in joint names for [Address 2] property from 2016 to 2017
- [Named] Electricity account in joint names for [Address 2] property from 2015 to 2017
- [Real Estate] letter regarding property inspection addressed to the sponsor and applicant dated 15 August 2016
- Residential Tenancies Bond Authority letter addressed to the applicant and sponsor dated [in] May 2017
- Residential Tenancy Agreement in joint names for the [Address 3] address, dated 21 December 2017
- [Named] Water letter to the sponsor at the [Address 3] address, dated 29 December 2017
- [Named] Water account in joint names at the [Address 3] address, in 2018
- [Named] Electricity Account in the applicant's name at the [Address 3] address, from December 2017 to 2018
- Bond Lodgement form for the [Address 3] address in joint names

- Tenant Ledger in joint names for the [Address 3] address dated 27 December 2018
- Photographs of the applicant and sponsor together and socially with family and friends

16. Adverse information received by the Department

17. On 10 August 2018, the Department received adverse information in the form of an allegation via their allegations email address. The allegation provided was from a person claiming that the applicant had provided false statements to the Department in support of his visa application, that he was illegally married and paid the sponsor to get a marriage certificate so he could reside in [Australia].
18. On 5 February 2019, the Department received further adverse information. Additional adverse information was received from checks conducted by the Department on Departmental movement records and related incoming passenger cards, where the sponsor declared her intended address in Australia as [Address 4], which was not an address declared to the Department as their marital home. Departmental movement records also indicated that the applicant had travelled with a person that identified herself as the applicant's ex-girlfriend [in] January 2018, declaring the applicant as her emergency contact and his mobile number on incoming passenger cards on two separate occasions, [in] December 2017 and [in] July 2018. The movement records did indicate that the applicant and the ex-girlfriend did not return to Australia at the same time.
19. On 20 February 2019, the Department wrote to the applicant inviting them to comment on the adverse information received by the Department.

20. Applicant's response to the adverse information received

21. On 18 March 2019, the applicant responded to the Department's invitation to comment, as well as advising the Department they had appointed a new representative. Their response to the Department included the following documents:
 - Statement by the applicant
 - Statement by the sponsor
 - Bond lodgement form for property at [Address 5] in the name of the applicant dated 20 July 2016
 - Photographs of the applicant and sponsor together and socially in 2018 and 2019
 - Residential Tenancy Agreement for property at [Address 6] in the name of the applicant, dated 2 September 2016
 - Bond lodgement form for property at [Address 6] in the name of the applicant, dated 2 September 2016
 - Emails between the applicant and [a named business] regarding missing payments in 2016
 - GP Consultation notes regarding the applicant's health concerns in 2017 and 2018

- Support letter by [Friend C] dated 8 March 2019
- Witness statement by [Friend D] dated 12 March 2019

22. In his statement, the applicant stated that he had experienced pressure in his marriage due to his business enterprise failing after he moved to Queensland in July 2016 for work, and he ended up owing a lot of money and returned to Melbourne after 6 months. The applicant claimed that when he told the sponsor, she was very upset and returned to live with her family in January 2017, after which the applicant started drinking heavily and experienced depression and suicidal thoughts. He claims that he tried to pick himself up by starting new works projects and this is when he met [Ms E] who approached him with a work proposition in June 2017. The applicant claims that due to her persistent advances and that he was still drinking a lot, a relationship developed between the two.
23. The applicant went on to state that it was not long after that that [Ms E] told the applicant she was pregnant, and the applicant told her he would not divorce the [sponsor]. The applicant states that [she] threatened to commit suicide if the applicant did not fly to China with her, and that the applicant felt compelled to stay in a relationship with her due to her harassment and threats of self-harm. The applicant claimed that he flew to China in October 2017 and November 2017 to be with [Ms E], but during this time he was still drinking heavily and missing the sponsor who was not talking to him. He claims that during this time [Ms E] forced him to have sex with her and she fell [pregnant], and he flew again to China in January 2018 to be with her.
24. The applicant went on to state that in January 2018 the sponsor contacted the applicant, and that they two reconciled the relationship as they realised they missed each other. The applicant claims he confessed about his affair with [Ms E] and she was upset but stated she was to blame too and wished to reconcile. The applicant stated that after he separated from [Ms E], she gave birth to the child without the applicant's permission and that she continued to harass the applicant. The applicant stated that since he reconciled with the sponsor at the end of January 2018 he had no private contact with [Ms E] and did not know why she would list him as her emergency contact on her incoming passenger cards.

25. *The Department decision*

26. On 8 October 2019, the delegate of the Department made a decision to refuse to grant the applicant the Subclass 801 visa on the basis that there was a lack of probative evidence provided by the applicant to substantiate their claims and the delegate was not satisfied that the applicant and the sponsor were in a genuine and continuing relationship, that they had a mutual commitment to a shared life together, or that they were not living separately or apart on a permanent basis.
27. The delegate found that the misleading information provided by the applicant as to where the applicant and sponsor resided, the breakdown of the claimed relationship and the applicant's entering into a relationship with [Ms E] until the applicant was presented with adverse information led the sponsor to doubt the veracity of the applicant's claims and found it difficult to find any of the evidence provided truthful. The delegate found that the information provided was fabricated for the sole purpose of obtaining a favourable outcome in his application for permanent residency.
28. The delegate found that the applicant was not in a genuine and continuing relationship with the sponsor as required under sections 5F(2)(c) and 5CB(2)(b) of the Act and was therefore not satisfied that the applicant was the spouse or de facto partner of the sponsor, and therefore did not satisfy cl. 801.221(2) of the Regulations and refused to grant the applicant the Subclass 801 visa.

29. The Tribunal application

30. On 24 October 2019, the applicant applied for review of the Department's decision with the Tribunal. The applicant provided a copy of the Department's decision record and notification letters alongside their application.

31. Invitation to provide information under s.359(2) of the Act

32. On 24 February 2023, the Tribunal wrote to the applicant via their authorised representative under s.359(2) of the Act inviting them to provide further information to support their claims of being in a spouse or de facto relationship with the sponsor. The letter provided the applicant with 14 days to respond or request an extension of time to provide the information. The letter stated that if the Tribunal did not receive the information within the period allowed or as extended the Tribunal may make a decision on the review without taking any further action to obtain the information, and that the applicant would lose any entitlement they might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.

33. Invitation to comment on or respond to adverse information under s.359A of the Act

34. On 3 March 2023, the Tribunal wrote to the applicant via their authorised representative under s.359A of the Act inviting them to comment on or respond to certain information that the Tribunal considered would, subject to the applicant's comment or response, be the reason, or a part of the reason, for affirming the decision under review. That information was that an allegation was made by a third party to the Department that the applicant and the sponsor were in a contrived relationship, the applicant provided false statements in support of their application and that the applicant paid the sponsor to sponsor their visa application for the purpose of granting permanent residency in Australia. It was also alleged that the applicant was in a relationship with another woman who was not the sponsor and had resided with her for more than a year, that she became pregnant with the applicant's [child].
35. The letter stated that this information was relevant to the review because it raised concerns that the applicant was not in a genuine and ongoing relationship with the sponsor, and that the applicant may have been in a contrived relationship for the purposes of being granted an Australian visa. It went on to state that if the Tribunal were to rely on this information, the Tribunal may find that the applicant was not in a genuine and continuing relationship with the sponsor, and this would form the reason or part of the reason for affirming the decision under review.
36. The letter provided the applicant with 14 days to give comments on or respond to information, or to request an extension of time to respond. The letter stated that if the Tribunal did not receive the applicant's comments or response within the period allowed or as extended that the Tribunal may make a decision on the review without taking further action to obtain the applicant's views on the information, and that the applicant would lose any entitlement they might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.

37. Invitation to comment on non-disclosure certificate validity

38. On 3 March 2023, the Tribunal wrote to the applicant via their authorised representative advising them that a s.376 non-disclosure certificate had been issued over certain folios of the Department's file on the basis that disclosure would be contrary to the public interest because it would disclose or enable a person to ascertain the existence of a confidential source of information, in this instance the full name of a Departmental employee. The letter provided the applicant with the gist of the material protected under the certificate, without

specifically stating the contents, and stated that subject to the applicant's comments, the Tribunal proposed to find that the certificate was valid. The Tribunal provided a copy of the non-disclosure certificate to the applicant and provided the opportunity to the applicant to comment on the validity of the certificate within 14 days.

39. The Tribunal did not receive a response to its invitation to comment on the validity of the non-disclosure certificate.

40. Change of representative and request for an extension of time to respond

41. On 3 March 2023, the Tribunal received an email from the applicant's representative advising that the applicant would not be attending the hearing scheduled for 27 March 2023 and would be providing the Tribunal with a written submission as to why the matter should be referred to the Minister for Ministerial Intervention, as the applicant had an established life with an Australian child. The email also requested that the applicant provide all responses to the Tribunal's requests, including the invitations under s.359A and s.359(2) of the Act, by 20 March 2023, requesting an extension of time. The Tribunal agreed to grant the extension of time as requested and advised the Representative that the hearing had been cancelled and all submissions should be provided by 20 March 2023.
42. On 10 March 2023, the Tribunal received advice from the applicant that they had appointed a new representative, as the previous representative had advised him to give up his hearing rights, and the new representative stated that the applicant wished to attend a hearing before the Tribunal. The Tribunal scheduled a new hearing date for 24 April 2023 and dispatched an invitation to the applicant to attend this hearing via their new representative on 20 March 2023.
43. On 20 March 2023, the applicant's new representative requested an extension of time to respond to the Tribunal's invitations of 24 February 2023 and 3 March 2023. The Tribunal agreed to an extension of time and requested that the applicant respond to the Tribunal's invitations by 27 March 2023.

44. Response to invitation under s.359(2)

45. On 25 March 2023, the Tribunal received an email from the applicant's representative in response to its invitation to provide further information under s.359(2) of the Act. The response consisted of a written submission by the applicant's representative, which stated that the applicant and his partner were no longer in a spouse or de facto relationship now. The submission went on to state the applicant regrets the breakdown of the relationship and blames himself and his actions in having an extramarital affair. It stated that the applicant and the sponsor had been in a long-term relationship and there was no reason to doubt the genuineness of the relationship, even if they were now broken up.

46. Response to invitation under s.359A

47. On 25 March 2023, the Tribunal received an email from the applicant's representative in response to its invitation to comment on or respond to adverse information under s.359A of the Act. The response consisted of a written submission by the applicant's representative dated 23 March 2023.
48. In their submission, the applicant's representative stated that the applicant agreed that he had an affair with another woman, [Ms E] during his marriage but did not enter a de facto relationship with [Ms E] and remained in a genuine relationship with the sponsor from 2010 to 2021. The submission stated that [Ms E] denied that she had reported any information to the Department about being in a relationship with the applicant, and that there was no

evidence that the applicant paid the sponsor to support their application for an Australian permanent visa.

49. The submission went on to state that the applicant admitted that he had separated from the sponsor during a difficult time in his life and had an affair with another woman, but that he had never thought about divorcing his wife and that the marriage had been genuine and there were no money issues. The submission stated that the applicant confessed his affair to the sponsor who decided to forgive him and helped him look after the child of the affair.
50. The submission also stated that [Ms E] is an Australian permanent resident and had told the applicant that she would sponsor him to obtain permanent residency if he married her, but that the applicant chose not to marry her as he loved the sponsor. The submission stated that [Ms E] was angry with this response, and that the person who reported the applicant to the Department might be a member of [Ms E]'s family seeking revenge on the applicant.
51. [Details from submission deleted]. [Ms E] gave birth to their [child] in 2018, who is an Australian citizen child named [Child F]. [Child F] is cared for by the applicant, and is raised by the applicant, with [Ms E] not seeing the child until 2022. The submission stated that the sponsor will sometimes visit the child after helping raise him, despite being divorced from the sponsor, but that the sponsor exclusively cares for and raises [Child F].
52. The submission concluded that as this case involves access and custody of an Australian child, that the Tribunal must have regard to Australian case law if a child of both the applicant and their Australian partner is involved, including the best interests of the Australian child.

53. *Pre-hearing submissions*

54. Prior to the scheduled hearing on 24 April 2023, the applicant provided the following documents via their representative in support of their application:
 - Photographs of the applicant and his son [Child F] out socially
 - Letter of reference by [Business 2] dated 22 March 2023
 - Letter of recommendation by [Business 1] dated 8 March 2023
 - Evidence of [Child F]'s enrolment at [School 1] dated [date]
 - Email from [Child F]'s Childcare Centre to the applicant regarding [Child F]'s health dated 3 February 2023
 - Email from [an education centre] regarding possible enrolment to the applicant dated 30 December 2020
 - [Bank 2] Personal Account Statement (unnamed) for period 24 November 2021 to 9 March 2023
 - [Bank 2] Joint Bank Account Statement (unnamed) for period 5 May 2021 to 30 March 2023
 - Direct Debit Request from [Day-care 1] in the applicant's name dated 11 May 2021
 - [Day-care 1] invoices in the applicant's name dated 24 February 2023 and 29 March 2023

- [Day-care 1] admission booklet for [Child F] [dated]
- Letter from [a named service] regarding parentage test between [Child F] and the applicant dated 13 November 2019
- Medical Certificate of [Child F] dated 4 April 2023
- Immunisation History Statement of [Child F] as at 3 April 2023
- Full Patient Summary of [Child F] as at 3 April 2023
- [School 1] Application for Admission, submitted [date]
- [Child F]'s Medicare Card
- Statutory Declaration of the applicant dated 16 April 2023
- Statutory Declaration of [Friend G] dated 13 April 2023
- Statutory Declaration of [Friend H] dated 16 April 2023
- Statutory Declaration of [Friend A] dated 13 April 2023
- Statutory Declaration of [Friend I] dated 16 April 2023
- Statutory Declaration of the sponsor dated 14 April 2023
- Statutory Declaration of [Friend J] dated 13 April 2023
- Letter of Support by [Friend K] dated 26 March 2023
- Letter of Support by [Friend L] dated 26 March 2023
- Letter of Support by [Friend M] dated 26 March 2023
- Letter of Support by [Friend N] dated 13 March 2023

55. Representative's submission dated 17 April 2023

56. The applicant's representative also provided a written legal submission to the Tribunal on 17 April 2023. In that submission, his representative stated that the applicant married the sponsor [in] July 2015, separated on 2 May 2021 and a joint divorce application was filed [in] February 2023. The submissions stated that the applicant's son [Child F] was born on [DOB 1] and is an Australian citizen. His biological mother is [Ms E] who has never assumed any parental responsibility over [Child F], and to whom the applicant never entered into any de facto or marriage relationship with.
57. The applicant's representative submitted that the sponsor fulfilled the social and psychological role of mother for [Child F], helping him get to bed on time, accompanying the applicant and [Child F] to buy meals and clothes and supporting [Child F]'s medical needs and filing medical documentation on behalf of [Child F]. It was submitted that the sponsor tried to build a happy family for [Child F] with the applicant, and that [Child F] felt more comfortable and secure in the presence of the applicant and the sponsor when she was still married to the applicant. It was submitted that the sponsor considers herself the parent of

[Child F], an Australian child, and that the applicant and sponsor provide [Child F]’s critical need for emotional and parental support and care, and that therefore this matter involves access and custody of an Australian child, and the best interests of that Australian child should be considered.

58. The Representative submitted that [Child F] needs emotional and parental support and care from the applicant, and that if the applicant was forced to return overseas and leave [Child F] in Australia, or if the applicant was forced to depart Australia and took [Child F] with him, this would have extremely negative effects on the child.

59. **Post Hearing Submission**

60. The Tribunal received a copy of an initiating family law application [in] April 2023 stating a Judicial Registrar First Return List is scheduled for [May] 2023 for parenting orders between the applicant and the mother of [Child F], [Ms E]. The orders request that the parties shall have equal shared parental responsibility for [Child F] and that the Applicant has sole parental responsibility in respect of the child's education. Time spent between each parent was also proposed.

Whether the parties are in a spouse or de facto relationship

61. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the ‘sponsoring partner’, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the ‘sponsoring partner’ of the applicant.
62. ‘Spouse’ is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant’s and sponsor’s household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

63. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. There is no marriage certificate on the files before the Tribunal however the applicant in their forms to the Department state that he was married to [the sponsor] [in] July 2015. They separated on 2 May 2021 and a joint divorce application has been filed [in] February 2023. The delegate in their decision refers to the couple’s wedding and marriage. The Tribunal accepts that the applicant and sponsor were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2) (a).

64. **Oral evidence taken at hearing**

65. The applicant confirmed his relationship ended with [the sponsor] officially ended in May 2021. He stated until this point in time they shared a joint account and the sponsor would also provide financial and emotional support to his son [Child F].
66. The Tribunal notes there is evidence of a shared bank account. The Tribunal stated that the sponsor claims the relationship ended in January 2017 and asked the applicant why the sponsor would claim a different date. The applicant stated they were in a "cold war" and the Tribunal asked the applicant if they were living together. The applicant confirmed that the sponsor stayed at her parent's house, separately from him. He explained that his sponsor was angry and moved back to her parent's house for a period of time. There is no evidence before the Tribunal of when the sponsor left or returned to live with the applicant.
67. The Tribunal asked the applicant about the parenting arrangements with his son and [the sponsor] and the applicant stated that [the sponsor] sees [Child F] once a fortnight or sometimes once a month. The applicant confirmed that [the sponsor] has not adopted [Child F] and there is no legally binding arrangement in place for the care of [Child F] with the sponsor.
68. The applicant stated that there is no formalised custody arrangements for [Child F] although he stated that his Migration Agent has recommended he obtain these and he has commenced proceedings in the last two weeks. The applicant stated he has 100% care of [Child F] as his mother left when [Child F] was a few months old and has just returned to Australia and she sees him occasionally. He stated [Child F] is [age] years old. The applicant explained that he lives with his parents and [Child F] and he and [Child F] share a bedroom. He said his parents care for [Child F] approximately 20% of the time when he has work commitments.
69. The Tribunal asked the applicant why it has taken [number] years to arrange custody arrangements. He explained that the mother was not in Australia until recently. The Tribunal notes that there is now an application before the courts for parenting orders for shared custody.
70. The Tribunal asked about the birth of [Child F] and the applicant stated he was at the hospital when he was born but the child's mother did not allow him to see the baby. It was only after a month when she called to say she can no longer look after him and the applicant took over the care of the baby.
71. The applicant stated that [Child F] has not seen his mother from when he was born until 2022.
72. The applicant stated she provided no child support during this period of time. He has paid everything in full.
73. The applicant stated that the child has an Australian passport however he believes he would struggle to obtain permission from the birth mother in order to leave Australia with his son.
74. The applicant provided a general run down of [Child F]'s daily routine stating he wakes around 8.30am and has breakfast and goes to childcare. The applicant stated that he picks him up at 4.30 and he has dinner and then a walk and shower and he goes to bed around 8.30-9pm.
75. He confirmed [Child F]'s date of birth is [DOB 1] and that he attends two day-care centres, [Day-care 1] and [Day-care 2].

76. The Tribunal asked about the custody arrangements being requested and the applicant stated they have just submitted the application 2 weeks ago. He claimed that the biological mother will keep custody access rights and will see [Child F] on his birthday and public holidays. The Tribunal asked why this would be put forward when the applicant has sole care of [Child F] at present and the applicant's representative explained that they are still in the negotiation stage and that the applicant is happy to provide the mother with access.
77. The Tribunal explained that in order to consider the relevant criteria regarding a child of the relationship, the child needs to be the child of the sponsoring partner or there needs to be formal custody and care arrangements in place.
78. The applicant's representative asked the Tribunal if Ministerial Intervention would be possible. The Tribunal asked the applicant if other visa options have been explored. The representative explained that a parent visa would need to be made offshore and would take a long time to process. Further she stated that the applicant would be subject to a s. 48 bar. The representative stated that the applicant may only have another partner visa application or certain skilled visa applications open to him.
79. The applicant confirmed he understood that no parenting order is in place and asked the Tribunal if it would wait until one was in place. The Tribunal is mindful of the relationship between the applicant and his son, however, notes that the parenting and custody application do not include the sponsor and as such cannot be a consideration in this instance in regards to the application under review as the child is not a child of the applicant and sponsor. Further, in spite of the applicant stating that the sponsor cares for [Child F], she is not included in the parenting order application.
80. The Tribunal explained that the applicant could seek Ministerial Intervention. Further, the Tribunal is not aware of the applicant's ability to successfully apply for other visas, nor is there evidence that [Child F] could not return overseas with his father given his birth mother has had such limited contact with the child.

Are the other requirements for a spouse relationship met?

81. As per the applicant's submission on 23 and 25 March 2023, the applicant and the sponsor are no longer in a spouse or de facto relationship. The sponsor stated the relationship ended in January 2017 and the applicant stated the relationship ended in May 2021. Notwithstanding the discrepancies in dates, the fact remains that both the applicant and sponsor state that the relationship has ended. As such, the applicant did not provide any submissions in relation to the financial aspects of the relationship, the nature of the household, the social aspects of the relationship or the nature of persons' commitment to each other.
82. However, in that submission, the applicant's representative submitted that the applicant had parental rights and obligations in regard to an Australian child, being his son [Child F], who it is submitted he has primary care and responsibility for.
83. The Tribunal has considered the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the applicant's commitment to each other. There is evidence up to and including 2019 showing the applicant and sponsor on some joint utility accounts and pictures of them together with [Child F] as well as statements of support however as both the applicant and sponsor have stated, the relationship is now over. As such, the Tribunal gives no weight to this evidence as the applicant and sponsor have confirmed that they are no longer in a continuing spousal relationship. Based on the evidence before it, the Tribunal finds that the relationship between the applicant and

sponsoring partner has ceased and that the applicant and sponsor are not in a genuine and continuing relationship as required under sections 5F(2)(c) and 5CB(2)(b) of the Act.

84. The Tribunal has considered clause 820.221(5) however the sponsor has not died and as such the applicant does not meet this criteria.
85. The applicant has not claimed that the relationship ended due to family violence suffered by the applicant or his dependent child and as such clause 820.221(6)(c)(i) does not apply.

Is there a child in respect of whom the applicant and sponsor have parental rights and obligations?

86. Clause 801.221(6)(c)(ii) requires that the relationship between the applicant and the sponsoring partner has ceased, and there is a child in respect of whom the applicant has custody, access, or a residence or contact order made under the *Family Law Act 1975*. The sponsor must also have these rights, or a child maintenance obligation.
87. A person can have a right to custody as an incident of the statutory imposition of parental responsibility by operation of the *Family Law Act* in relation to a biological child. Similarly, a person can have a formal maintenance obligation to a biological child without a court order, by operation of the *Child Support (Assessment) Act 1989* rather than the *Family Law Act: Srouf v MIMIA* (2006) 155 FCR 441.
88. The applicant has claimed he has parenting responsibilities to his son [Child F]. However, [Child F] is not the biological child of the sponsoring partner. As such the applicant does not meet the criteria for clause 801.221(6)(c)(ii).
89. Given these findings the Tribunal is not satisfied that the requirements of s 5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl 801.221(2)(c).
90. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl 801.221(2A), (3), (4), (5) and he does not meet clause 801.221(6)(c)(ii).

CONCLUDING PARAGRAPH

91. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

92. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Rachel Westaway
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).